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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY, a corporation,

Petitioner,

v.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a corporation, and PAUL C. BEARDSLEE, TRUSTEES,

Respondents.

BRIEF FOR OWENS-ILLINOIS GLASS COMPANY AND LIBBEY-OWENS-FORD GLASS COMPANY, RESPONDENTS.

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Respondents.

BRIEF FOR OWENS-ILLINOIS GLASS COMPANY AND LIBBEY-OWENS-FORD GLASS COMPANY, RESPONDENTS.

THE CASE AND OPINION BELOW

On March 2, 1936, the District Court for the Southern District of West Virginia, disapproved and dismissed the original and supplemental petitions of the Wayne United Gas Company (petitioner) for reorganization under section 77B of the Bankruptcy Statute. Petitioner failed to take an appeal under

section 25(a) within the period of thirty days provided thereby. On April 24, 1936, at a succeeding term of the Court, petitioner filed a petition for rehearing. On May 12th, the District Court set aside its original order and granted the rehearing, but on May 28th, it again disapproved and dismissed the petitions for reorganization. Petitioner perfected an appeal to the Circuit Court of Appeals and a motion to dismiss was filed by respondents.

The Circuit Court of Appeals held that the effect of the order granting the rehearing, as well as of the order dismissing the several petitions for reorganization, was an attempt to extend the time for appealing the order of March 2nd beyond the statutory period of thirty days. It, therefore, dismissed the appeal "as though it had been taken from that order." (R. 60).

The court's opinion is found at page 59 of the Record, and reported in 84 F. (2d) 965.

QUESTION PRESENTED

The question presented is whether the District Court had jurisdiction to vacate and reconsider its order of March 2, 1936, upon petition filed after the period for appealing that order had expired, and after the term at which it was entered.[1]

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[1] The issue is similarly presented in brief of petitioner, pages 16-17. The statement of the "Question Presented" at page 2 of brief for petitioner omits reference to the fact that the rehearing was allowed at a subsequent term of court.

STATEMENT

The order of March 2, 1936, disapproved and dismissed the original and first amended petitions for reorganization filed by the debtor (petitioner), decreed costs to the respondents and ordered that the cause be retired from the docket. (R. 3).

April 15, 1936, the Circuit Court of Appeals denied an appeal under section 24(b) of the Bankruptcy Act, holding that the order of March 2d was appealable under section 25(a) of said Act.

April 16, 1936, debtor prepared and signed notice of intention to apply for rehearing in the District Court. (R. 4.)

April 21, 1936, a new term of the District Court began at Charleston. (R. 19.)

April 24, 1936, debtor filed its petition praying that the order of March 2d be set aside and vacated and for a rehearing and review of all matters arising in the proceedings. (R. 6-12.)

May 12, 1936, the District Court vacated and set aside the order of March 2d and granted and awarded "a rehearing or a review" of the matters arising in the proceeding. (R. 18.)

The only matter contained in the petition for rehearing not theretofore presented in the original and

amended petitions for reorganization was the reference to the unsuccessful attempt to secure a review of the order of March 2d under section 24(b) of the Bankruptcy Act. Upon this petition, the Court found that "good cause" existed for setting aside its previous order. (R. 18.)

May 28, 1936, the District Court entered a final order again disapproving and dismissing the petitions for reorganization as not filed "in good faith". It again decreed costs to the respondents and again retired the cause from the docket. The findings contained in the order were an elaboration of the conclusions reached in the order of March 2d. Among other things, the Court found that the assets of the petitioner were insufficient to pay off the first mortgage indebtedness of approximately $1,900,000; that said amount "is due and payable at this time", and that "the securities of the Debtor, other than the first mortgage bonds, represent no equity or value in the mortgaged property to support such securities." (R. 22.)

SUMMARY OF ARGUMENT

A summary of the points of argument is incorporated in the Subject Index, *ante*.

ARGUMENT

(1)

The District Court had no jurisdiction to vacate the order of March 2d, and to grant a rehearing, upon a petition filed after the expiration of the period for appeal therefrom.

The Circuit Court of Appeals adopted the view that the provisions of section 25(a) of the Bankruptcy Act which limit the appeal period to thirty days necessarily limit the time for rehearing to the same period.

Petitioner attempts to avoid this principle with the assertion that "a federal district court" has power to grant a rehearing of "a final judgment or decree" after the expiration of the appeal period, and that "in cases at law or in equity the only limitation upon this power" is that it must be exercised within the term. Upon the theory that there are no terms in bankruptcy,[2] petitioner proceeds to the conclusion that there is no limitation upon a rehearing in a bankruptcy proceeding other than that the application be made "seasonably" and before rights have become vested.

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[2] "A proceeding in bankruptcy from the time of its commencement, by the filing of a petition to obtain the benefit of the Act, until the final settlement of the estate of the bankrupt, is but one suit. The District Court, for all purposes of its bankruptcy jurisdiction, is always open. It has no separate terms." *Sandusky v. National Bank*, 90 U. S. (23 Wall.) 289, 293.

Petitioner takes this view notwithstanding that the order of March 2, 1936, was a final one closing the case, retiring it from the docket, and that the term at which it was entered, as well as the appeal period, had expired when the appplication for rehearing was filed.

The rule of the district courts in law and equity cases, invoked by petitioner, has no application to this proceeding. The jurisdiction to grant a rehearing in equity is controlled by Equity Rule 69. That rule expressly limits the period for the allowance of a rehearing to the term at which the decree is entered. This limitation is analogous to the principle which prevents a court of law from granting a new trial upon motion made after the term at which the judgment is entered.[3] During the term, a decree or judgment is deemed to be within the breast of the court. Consistent with this principle, it is immaterial to the allowance of a rehearing in law and equity cases that the appeal period has expired, *provided that the term*[4] has not come to a close. Appellees do not challenge the many cases cited by petitioner which support this proposition.[5]

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[3] *United States* v. *Mayer*, 235 U. S. 55; *United States* v. *Benz*, 282 U. S. 304.

[4] All italics ours.

[5] *e. g., Zimmern* v. *United States*, 298 U. S. 167; *Memphis* v. *Brown*, 94 U.S. 715; *Northwestern P. S. Co.* v. *Pfeifer* (C.C.A. 8th) 36 F. (2d) 5; *Chicago, M. & St. P. Ry. Co.* v. *Leverentz* (C.C.A. 8th) 19 F. (2d) 915; *Clarke* v. *Hot Springs E. L. & P. Co.*, (C.C.A. 10th) 76 F. (2d) 918.

The principle which limits a rehearing in law and equity cases to the term can have no application to a pending bankruptcy proceeding in which the court is always open and in which there are no terms. Similarly, the numerous law and equity decisions cited by petitioner furnish no guide as to the period within which a rehearing may be allowed in a bankruptcy case. Petitioner insists that, there being no terms, the usual limitation upon the period for a rehearing is removed, and that orders in bankruptcy, although final and appealable, remain in the control of the court and may be reconsidered unless rights have become vested.

It is plainly the intent of the Bankruptcy Act that those who deem themselves prejudiced by final orders in a proceeding shall appeal the same within the period provided or be bound thereby. The Act contains numerous provisions for the speedy and summary disposition of questions presented thereunder. Consistent with these views, respondents contend, and the Circuit Court of Appeals held, that orders reviewable under section 25(a) but not appealed thereunder, are final and irrevocable. They are no longer within the discretionary control of the court to recall upon application for reconsideration.

In *Conboy* v. *First National Bank*, 203 U. S. 141, the appellant made application for a rehearing in the Court of Appeals after the expiration of the appeal period of thirty days at that time provided in Gen-

eral Order in Bankruptcy XXXVI. The rehearing was denied, and application was made to this Court for an appeal. In holding that the application came too late, the opinion of MR. JUSTICE FULLER states:

> "The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing."

The opinion notes the point that the petition for rehearing was *denied* and concludes with this statement:

> "Whether it could have been granted in view of the terms and spirit of the Bankruptcy Act, or the effect, if it had been, we are not called upon to discuss."

The Circuit Court of Appeals in this case and other Courts have given the effect to the "terms and spirit" of the statute which seems to have been intended by this Court.* The rule adopted by these courts is that, where no appeal is taken or rehearing sought within the thirty days, the jurisdiction of the District Court is exhausted, and that such court is without power either to reconsider its decree or to revive the right of appeal therefrom. It was clearly the intent of Congress that orders appealable under section 25(a) should become final unless relief therefrom is sought within the period prescribed, and the decision of the

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* Cf. *Old Nick Williams Co.* v. *United States*, 215 U.S. 541; *Credit Company* v. *Arkansas Central Railway Co.*, 128 U.S. 258, 261.

Circuit Court of Appeals in this case gives to the statute the only interpretation consistent with that intent.

This Court has never departed from its analysis of the purposes of the Bankruptcy Act as stated in the case of *Wiswall* v. *Campbell*, 93 U. S. 347, 350, where it said:

> "Congress in enacting the Bankruptcy Law, had apparently in view: (1) the discharge, under some circumstances, of an honest debtor from legal liability for debts he could not pay; and (2) an early pro rata distribution, according to equity, of his available assets among his several creditors. Prompt action is everywhere required by law. In *Bailey* v. *Glover*, 21 Wall. 346, we said, speaking through Mr. Justice Miller, that 'it is obviously one of the purposes of the bankrupt law that there should be a speedy distribution of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay.'"

It is the intention of Congress that a bankruptcy proceeding be carried to conclusion with the greatest speed consistent with justice. In equity cases generally, ninety days are allowed for taking an appeal. In bankruptcy cases, certain final orders must be appealed in one-third that time. Speedy finality for such orders is demanded. Yet petitioner contends that until

rights shall have become vested, a decree, however final, is continuously open for re-examination and revision upon a rehearing "seasonably" applied for.

The same question as is here presented was considered in the case of *In re Stearns & White Co.*, 295 Fed. 833, decided by the Circuit Court of Appeals for the Seventh Circuit in 1924. That court critically and exhaustively examined the contentions, similar to those made by petitioner here, and definitely concluded that the period for rehearing and the period for appeal were the same. In that case the District Court, by orders entered February 3d and 28th, 1923, affirmed the referee's allowance of a claim for $17,056.96. The order was appealable under section 25(a). At that time the appeal period was limited to ten days.[7] Appellant did not perfect an appeal within that period. Two months later, an order was entered vacating the orders of February 3d and 28th, but again affirming the referee's allowance. The decision of the Circuit Court of Appeals was upon the motion to dismiss the appeal taken from this last order. Reviewing the historical development of the Bankruptcy Act and the decisions of this Court, CIRCUIT JUDGE PAGE concluded that:

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[7] By section 8 of the Act as enacted in 1867, the appeal period from an order allowing or rejecting a claim was fixed at ten days. By the act of July 1, 1898, Ch. 541, section 25 (a) 30 Stat. 553, the same limitation of ten days was made applicable to orders of adjudication. By the Act of May 27, 1926, Ch. 406, sec. 10, 44 Stat. 665, the period of appeal from both classes of orders was extended from ten to thirty days.

> "The early and final determination of the three appealable matters specified in section 25a is of vital importance, if the administration of estate in bankruptcy is to be accomplished within any reasonable time.
>
> "We are of opinion that the judgments that may be appealed from under the provisions of section 25a are final judgments; that after the time for appeal has expired, unless a petition for reconsideration has been filed within ten days, they may not be disturbed, except under the provisions of section 57k."

JUDGE PAGE rejected the suggestion that Congress intended to leave the way open to rehearings for an indefinite length of time after the entry of the final order. Such an intention is the very antithesis of the "terms and spirit" of the Bankruptcy Act and of the "quick and summary" disposal of questions which this Court has said is one of the principal aims of the statute.

It was upon this conception of the spirit and purpose of the Bankruptcy Act that the Circuit Court of Appeals disposed of the present case as follows:

> "We are of opinion that the Court below was without power to grant a rehearing and set aside the order of March 2nd after the expiration of the period allowed for appeal from that order."

Petitioner urges that the decisions* cited in the *per curiam* opinion are not persuasive for the reason that it reasonably appeared in each of them that the rehearing was sought for the express purpose of restoring the right of appeal. The significant fact here is that in the cases cited the courts definitely recognized the *lack of power* in the District Court to reopen the proceeding after the appeal period of thirty days, and that they predicated this lack of power upon the terms and spirit of the Bankruptcy Act as indicated by this Court in the *Conboy* decision.

> "This petition is in the record designated as a petition to reopen or, if it be considered as a petition for rehearing, the effect of such petition and its status as a legal document is substantially the same. If it be considered in the nature of a petition for rehearing, it would seem that, because of having been filed after the expiration of the thirty days allowed for appeal, it came too late. *Conboy* v. *First National Bank*, 203 U. S. 141, 27 S. Ct. 50, 51 L. ed. 128."
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> *Bonner* v. *Potterf, supra.*

> "From this record, it is clear that the trustee in bankruptcy obtained a final judgment of the District Court disallowing the claim of the United States against the bankrupt estate on October 12, 1932, and that the right of the United States to appeal from the order was lost

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* *Bonner* v. *Potterf*, (C.C.A. 10th, 1931) 47 F. (2d) 852; *United States* v. *East*, (C.C.A. 8th, 1935) 80 F. (2d.) 134.

> to the government by its failure to take an appeal within the thirty days fixed by statute. The proceedings by which it was attempted to extend time of appeal was ineffectual to that end. *Conboy* v. *First Nat. Bank of Jersey City*, 203 U. S. 141, 27 S. Ct. 50, 51 L. ed. 128."
>
> *United States* v. *East, supra.*

A singular confusion of thought has resulted in certain cases from a failure to recognize the elemental proposition that after the appeal period there is no *jurisdiction* to entertain a petition for reconsideration. For example, in *In re American S. S. Nav. Co.*, (D.C.E.D. Pa. 1933) 14 F. Supp. 106, and in *In re Wright* (D. C. Mass. 1899) 96 Fed. 820, it was held that it was within the jurisdiction of the district court to grant a rehearing asked for the express purpose of reviving the right of appeal.[9] Other cases, including *West* v. *McLaughlin's Trustee* (C.C.A. 6th, 1908) 162 Fed. 124, relied upon by petitioner, denies the existence of any such authority, and clearly the better rule is that it is an abuse of power for a court at any time to grant a rehearing merely for the purpose of making possible an appeal. This is true whether the application be granted before the expiration of the appeal period for the purpose of extending the same,[10] or

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[9] Other cases of like import cited in brief for petitioner, page 27, footnote 4.

[10] *In re L. H. Seifer & Sons, Inc.*, (C.C.A. 7th, 1935) 78 F. (2d) 196, cert. denied, 296 U. S. 618.

after the appeal period for the purpose of reviving it.

In the opinion in *In re Stearns & White Co., supra,* the court held that after the expiration of the appeal period orders appealable under section 25(a) "may not be disturbed, except under the provisions of section 57k."

Section 57k (U. S. C. Title 11, sec. 93, subd. k) is as follows:

> "Claims which have been allowed may be reconsidered for cause and re-allowed or rejected in whole or in part, according to the equities of the case, before but not after the closing of the case."

If petitioner's position in this case be correct, the foregoing section is mere surplus legislation. The only reasonable conclusion to be drawn from sections 25(a) and 57(k) is that orders appealable under the former become final and irrevocable at the expiration of thirty days, with the single exception that *an order allowing a claim* may be reconsidered for cause at any time prior to the closing of the estate.[11] Petitioner would enlarge upon this exception with the contention that any order appealable under section 25(a) may be reconsidered at any time before rights thereunder have become vested.

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[11] This point of view is consistent with the reasoning of the Circuit Court of Appeals for the Seventh Circuit in *In re L. H. Seifer & Sons, Inc., supra.* where it was stated that the provisions of section 57k are "exclusive".

Petitioner's argument (pages 17-21) carries repeated references to the Sandusky Case[12] and concludes with the statement that:

> "It is submitted that the action of the District Court in the case at bar is sustained by the doctrine of the Sandusky case and the line of federal decisions which has followed it.'"

The decision of this Court in the Sandusky case is but remotely relevant here. Sandusky was adjudicated a bankrupt. Months later he filed a petition in the District Court praying that the order of adjudication be set aside and vacated. The Court dismissed the petition. The Circuit Court affirmed the order of the District Court. Sandusky appealed to this Court, and, upon motion to dismiss, the question arose whether the petition filed in the District Court presented "a case in equity" under the Bankruptcy Act appealable here, or merely a part of the proceedings in bankruptcy of which this Court could not take jurisdiction on appeal. No question of time restriction on the period for rehearing or appeal was involved. No such question could have been presented for the reason that the Bankruptcy Act at that time fixed no period for an appeal from an order of adjudication. The point decided was that a petition for rehearing is part and parcel of "the proceedings in bankruptcy". There is no reason to believe that this Court, in explaining the continuous character of such

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[12] *Sandusky* v. *National Bank, supra.*

a proceeding, intended to express any opinion as to the effect of a statutory limitation upon the period in which appeals may be taken or rehearings considered.

With the possible exception of the opinion in *West* v. *McLaughlin & Co.'s Trustee, supra*, the expressions relied upon by petitioner in the cases cited by it are voluntary and collateral to the real issues involved.

In *West* v. *McLaughlin & Co.'s Trustee* the District Court on July 23, 1907, disallowed a claim for $5000.00. Upon a rehearing, applied for and granted more than ten days subsequent to said date, the District Court again disallowed the claim. The trustee in bankruptcy moved to dismiss the appeal taken from the subsequent order. The Circuit Court of Appeals overruled the motion to dismiss. The decision rests for justification upon certain expressions of the same court in the earlier case of *In re Ives* (C. C. A. 6th, 1902) 113 Fed. 911, also cited by petitioner. In the latter case, a creditor filed a petition to vacate the adjudication of a voluntary bankrupt. Said petition was filed more than ten days after the order of adjudication. The court held that the creditor had no right at any time to oppose the adjudication by appeal, motion to vacate, or in any other manner, and, therefore, dismissed the petition. The power of the District Court to vacate its prior order and to grant a rehearing after the appeal period was not properly

in issue. The general language in the opinion that "the proceedings in a *pending* suit" are at all times open for reexamination and that the court had power to determine the matters presented in the petition was not relevant to the decision.

It is significant to compare the language in these opinions with the subsequent decision of the same court in *Brady et al.* v. *Bernard & Kittinger, et al.*, (C. C. A. 6th, 1909) 170 Fed. 576. The facts were that on April 17, 1908, Philip Brady was adjudicated a bankrupt. More than ten days later, Brady and others moved the District Court to set aside the order of adjudication on the ground of alleged fraud on the part of those who had procured its entry. This motion was overruled and an appeal was taken. Motion to dismiss was filed on the ground that the appeal was not taken within ten days from the date of order of adjudication.

The opinion of DISTRICT JUDGE SANFORD, concurred in by JUDGES SEVERENS and KNAPPEN is in part as follows:

> "In so far as the appeal was taken from the judgment of adjudication entered April 17, 1908, the motion to dismiss must be granted. Section 25a of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), provides that an appeal taken from a court of bankruptcy to the Circuit Court of Appeals from a judgment adjudging a defendant

> a bankrupt 'shall be taken within ten days after the judgment appealed from has been rendered.' As no appeal was prayed or granted from the judgment of adjudication within 10 days after its rendition, the time for appealing therefrom expired at the end of the said 10 days, and could not be extended or revived by any subsequent proceeding in the case. Credit Company v. Arkansas Railway Company, 128 U. S. 258, 261, 9 Sup. Ct. 107, 32 L. Ed. 448; Conboy v. First Nat. Bank, 203 U. S. 141, 145, 27 Sup. Ct. 50, 51 L. Ed. 128; In re Alden Electric Company, 123 Fed. 415, 50 C. C. A. 509. As neither the motion nor the petitions to set aside said judgment were made or presented to the court until after the expiration of said 10 days, the case cannot, for that reason, if for no other, be brought, even by analogy, within the rule laid down by this court in the case of Mills v. Fisher & Co., 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656, that where a petition to rehear is filed within 10 days after the judgment the time for taking an appeal is thereby extended."

For the reason stated, and the additional reason that the Bankruptcy Act made no provision for the appeal of the order overruling the motion to set aside the adjudication, the appeal was dismissed. The statement above quoted, that the appeal period can not be "extended or revived by any subsequent proceeding in the cause" gives true effect to the statutory provision. When the attempted extension or revival is in the form of an application for rehearing after the appeal

period the inhibition of the statute is a bar which neither the court nor a litigant has power to ignore.

In *Cameron v. National Surety Co.* (C.C.A. 8th, 1921), 272 Fed. 874, the Circuit Court of Appeals for the Eighth Circuit pointed out specifically that the order appealed from did not refer in any way to the original order of adjudication, but was "an independent order made upon the pleadings and proofs." So considered, it did not present for determination the correctness of the original order of adjudication in bankruptcy or the subsequent order vacating the same. The validity of prior orders was not in issue. Not so here. The order of May 28, 1936, was expressly a disposition of the issues arising in the proceedings upon rehearing. Its validity, upon motion to dismiss, depends entirely upon the validity of the order vacating the order of March 2, 1936, and granting a rehearing thereof. The opinion in *United States* v. *East, supra,* decided in 1935, indicates that the Circuit Court of Appeals for the Eighth Circuit holds to the view that an application for rehearing filed after the appeal period is "ineffectual" to restore the right of appeal. It cites the *Conboy* case in support of this conclusion.

The decision in *In re Rochester Sanitarium & Baths Co.* (C.C.A. 2d, 1915) 222 Fed. 22, has no bearing here. There the estate had been closed and the trustee discharged. Two years later the order closing the

estate and discharging the trustee was vacated, upon a showing that the estate had not been fully administered. The Court held that the case was governed "by the express language" of section 2 of the Bankruptcy Act providing for the reopening of an estate where it is made to appear that it has been closed without being fully administered.[13]

Petitioner's statement that the decision in this case is contrary to "the rule recognized in the Third Circuit" rests upon *In re American S. S. Nav. Co. supra.*[14] The District Court granted a rehearing of an order allowing a claim for the express purpose of restoring the right of appeal. In that case District Judge Kirkpatrick had this to say:

> "In cases of this kind, two distinct questions arise which are often confused. First, has this court the power to grant a rehearing? That is all that is before me. Second, if so, will it be effective to revive the petitioner's lost right of appeal? With that I have nothing to do."
>
> * * *
>
> "I express no opinion as to whether the petitioner's appeal can legally be prosecuted, or whether his right is gone beyond recall. That question I conceive to be for the appellate court."

On motion to dismiss the appeal taken in that case, the Circuit Court of Appeals for the Third Circuit

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[13] U.S.C. Title 11, sec. 11, subd. 8.

[14] District Court—E. D. Pa. (1933) 14 F. Suppl. 106.

specifically approved the proposition that a District Court is without power to grant a rehearing of such an order after the appeal period of thirty days, stating its views as follows:

> "The appellee contends in support of his motion, that the District Court has no power to allow a petition for the rehearing of a claim for the simple purpose of extending the time allowed for an appeal of its order. Doubtless, that is a correct contention. Conboy v. First National Bank, 203 U. S. 141; Bonner v. Potterf, 47 Fed. (2d) 852 (C.C.A. 10). Such action would permit the defeat of the intention of section 25(a) of the Bankruptcy Act, as amended, which provided that appeals in bankruptcy from an order allowing or rejecting a claim must be taken within thirty days after the order has been rendered. 11 U.S.C.A. section 48."
>
> (*Samuel W. Cooper, Trustee*, v. *A. Lincoln Rauch*, decided October 24, 1934; unreported opinion copied in full "Appendix A").

Further in the opinion, the Court quoted with approval the language of CIRCUIT JUDGE PAGE in *In re Stearns and White Company, supra*, and stated that the appellant's right to a rehearing was limited to the relief provided in section 57(k). Entertaining these views the court said that "If this was an ordinary case, we would be constrained to dismiss the appeal". A peculiar circumstance in that case, however, was the fact that the same attorney had acted in the dual

capacity of trustee in bankruptcy and counsel for the beneficiary of the allowance in the District Court. By conduct "highly suggestive of bad faith and fraud" he had failed to perfect the appeal within the statutory period. It was for this reason that the motion to dismiss the appeal was "at this time" denied.

Upon the hearing on the appeal, the Circuit Court of Appeals, in a *per curiam* opinion of six lines, affirmed the order of the District Court without reference to the procedural question.[15] The case was an extraordinary one on its facts, and the appellate court deemed it expedient to affirm the case on its merits.

The principle that the jurisdiction of the District Court to entertain a rehearing of orders appealable under section 25(a) expires with the appeal period is definitely recognized and established by the highest courts in the Third, Fourth, Seventh, Eighth, and Tenth Circuits.[16] Any expressions to the contrary in the opinions from the Sixth Circuit can hardly be considered persuasive authority elsewhere.

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15 *Per Curiam;* "After argument and full consideration in this case, we are of opinion the judge below, as set forth in his opinion, was justified in dismissing the exceptions filed to the claim of the appellee and in his allowing such claims. The judgment below is therefore affirmed."

Cooper, Trustee, v. *A. Lincoln Rauch* (C.C.A. 1936) 82 F. (2d.) 1005.

16 See respectively: *Samuel Cooper, Trustee,* v. *Rauch* "Appendix A"; *Wayne United Gas Co.* v. *Owens-Illinois Glass Co. et al.; In re: Stearns & White Co. supra; United States* v. *East, supra; Bonner* v. *Potterf, supra.*

(2)

The District Court had no jurisdiction to entertain a petition to vacate the order of March 2, 1936, filed at a subsequent term of court.

The Sandusky opinion states that from the "filing of the petition" to the "final settlement of the estate" a bankruptcy proceeding is "but one suit." The Bankruptcy Court "is always open." It has no separate terms. Its proceedings in "any pending suit" are at all times open for re-examination and may be set aside.

The reason for the rule as thus stated is that the Bankruptcy Act authorizes courts of bankruptcy to exercise their jurisdiction "in vacation, in chambers, and during their respective terms."[17] It does not follow from this, however, that bankruptcy courts are exempt from the basic rules of procedure, not in conflict with the statute. "They are essentially courts of equity, and their proceedings inherently proceedings in equity . . . Their adjudications and orders constitute in all essential particulars decrees in equity."[18]

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[17] U. S. C. Title 11, Sec. 11.

[18] *Continental Ill. N. B. & T. Co.* v. *C. R. I. & P. R. C.*, 294 U. S. 648, 675.

By virtue of the statute a pending bankruptcy case is considered one continuous proceeding from the filing of the petition until the closing of the estate, but there is nothing to warrant the view that the proceeding continues after the petition has been dismissed and the cause retired from the docket. When that occurs the jurisdiction of the court can certainly be no wider than in an ordinary suit in equity where a final order dismissing the bill and retiring the case has been entered.[10]

Upon the entry of an order of adjudication, or, of an order approving a petition for reorganization under section 77-B, there comes into being a "pending" case and during its "progress" the court is always open regardless of terms. When, however, adjudication is denied, or a petition for reorganization is disapproved and the cause dismissed, nothing is pending and no case is in progress.

In such event the assets of the debtor are not in *custodia legis*, but in its own custody, subject to the claims of creditors and the decrees and judgments of state courts.

There is no statute and no analogy to equity or common law practice from which it can be asserted that such an order does not become final and irrevocable at the close of the term at which it is entered.

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[10] Except perhaps under the provisions of section 2 authorizing the reopening of cases not fully administered.

These views are supported by the opinion in *In re Glory Bottling Co. of New York, Inc.*, (C. C. A. 2d, 1933) 283 Fed. 110, where an involuntary petition having been dismissed with costs, the petitioning creditors some months later made a motion to vacate and for a rehearing. The order of the District Court granting the rehearing was reversed by the Circuit Court of Appeals with the following statement:

> "The situation at bar is somewhat analogous with the question disposed of in Matter of Hollins, 238 Fed. 787, 151 C. C. A. 637, where the court pointed out that after a composition was confirmed the bankruptcy court was without jurisdiction to pass upon claims made by third parties to the property thereafter turned over. In other words, the court held, as the Bankruptcy Act provided, that the title of the bankrupt to his property 'shall thereupon revest in him.' Section 70f (Comp. St. § 9654).
>
> "So, in the case at bar, when the petition was dismissed, all of the proceedings incident to the petition ended, and the property of the bankrupt thereafter became again under his full control. It is, of course, immaterial that at a subsequent date another petition was filed, for such later proceedings cannot in any manner affect the restored status of the alleged bankrupt, created by the dismissal of the first petition.
>
> "The case at bar is entirely distinguishable from that class of cases where a petition has not been dismissed, and is pending, but leave has

> been given to amend the petition; and it is also distinguishable from those cases, where creditors have intervened, as in In re Bolognesi, 223 Fed. 771, 139, C. C. A. 351 and In re Diamond Fuel Co., 283 Fed. 108, decided contemporaneously herewith. * * *"

None of the decisions cited by petitioner are contrary to the views here stated. An order of adjudication, of course, creates a "pending" case, and the statement that such an order may be vacated at a succeeding term[20] is in harmony with the principle that a bankruptcy proceeding is a continuous case until closed. The order confirming a sale by the trustee in bankruptcy in *In re Burr Mfg. & Supply Co.*, (C. C. A. 2nd. 1914) 217 Fed. 16, was an administrative order in the progress of the proceeding. An order committing the bankrupt for contempt, such as was entered in *Freed* v. *Central Trust Co.*, (C. C. A. 7th) 215 Fed. 873, is obviously not a final order disposing of the proceeding.

A bankruptcy case is *sui generis* only to the extent that the procedure therein is made so by the Bankruptcy Act. In other respects it is controlled by the same principles which govern equity practice. This being true, the order which closed the term at which the order of March 2, 1936, was entered, also closed the door to a petition for reconsideration.

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[20] *In re Rochester Sanitarium & Baths Co.*, (C. C. A. 2d.) 222 Fed. 922; also cases cited by petitioner at pages 19-20.

CONCLUSION

Petitioner devotes a large part of its argument to the rule in equity cases that a rehearing may be granted within the term although the appeal period has expired. Neither the rule nor the cases cited in support thereof control the decision of the present case.

Petitioner asserts that in bankruptcy proceedings the jurisdiction to entertain a rehearing does not expire with the appeal period, but that such jurisdiction continues until rights have become vested, relying upon the principle of the *Sandusky* case. Section 25(a) of the Bankruptcy Act, which limits the appeal period for the review of certain orders to thirty days, imposes a similar limit upon the period for reconsideration. Moreover, in the case of a final order dismissing a petition for reorganization and retiring the cause from the docket, if both the appeal period and the term are permitted to expire without application for appeal or rehearing, there is no "pending" proceeding before the Court.

There is no diversity of opinion among the circuit courts of appeal with respect to the issue here presented, for the reason that the present question involves elements not involved in any case heretofore decided. In this proceeding not only had the appeal period expired, but the petition for reorganization had been dismissed and the term had expired.

Points (1) and (2) herein are distinct propositions and cases might arise in which it would be necessary to choose between the two. It is unnecessary to make that choice here. The Circuit Court of Appeals based its ruling upon the first point and respondents believe that both the reasoning and the decision of that court are correct in every particular. The ruling must also stand for the reason that there was no pending cause after the expiration of the term at which the order of March 2, 1936, was entered, and therefore nothing within the breast of the court for its reconsideration.

The order of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

H. D. RUMMEL,
D. O. BLAGG,
A. G. STONE,
Counsel for Owens-Illinois Glass Company and Libbey - Owens - Ford Glass Company, Respondents.

Charleston, W. Va.
December 29, 1936.

APPENDIX A

IN THE

United States Circuit Court of Appeals,

FOR THE THIRD CIRCUIT

No. 5400. March Term, 1934.

SAMUEL W. COOPER, Trustee, American Steamship Navigation Company, by WILLIAM J. F. REYNOLDS, Objecting Creditor,

Appellant,

v.

A. LINCOLN RAUCH, Trading as CONTINENTAL LUMBER COMPANY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

OPINION

(Filed October 24, 1934)

Before Buffington and Davis, Circuit Judges.

DAVIS, Circuit Judge.

This case is here on a motion of A. Lincoln Rauch, appellee, to dismiss the appeal.

In March, 1920, a petition in bankruptcy was filed against the American Steamship Navigation Company. In due course it was adjudicated a bankrupt and Samuel W. Cooper, Esquire, was appointed receiver and later elected trustee of the estate. On February 2, 1921, and before his election as trustee, he filed a claim for the appellee for damages alleged to have arisen from a breach of a contract to carry lumber to Spain. No action has ever been taken to liquidate this claim. But there was litigation extending seven or eight years by the trustee against a trust company which resulted in the collection of a sum of money in 1929, the year in which the trustee filed his account. The referee in his schedule of distribution mentioned the claim involved here, but instructed appellant's counsel to withhold the checks on the claim. The appellant filed a petition in the District Court asking permission to file exceptions to several claims, among which was the claim here in issue. Permission was given and exceptions were filed and the referee, after taking a great deal of testimony, on July 14, 1932, sustained the exceptions to the claim and ordered it dismissed.

The appellee filed a petition for review which was heard by Judge Kirkpatrick who filed an opinion reversing the order of the referee on the ground of laches of the objecting creditor, and entered an order of February 21, 1933, allowing the claim. The objecting creditor urged the trustee to appeal from the order allowing the claim, but he was then and since filing the claim had been, counsel for the claimant whose interests were hostile to those of the objecting creditor and to other creditors. He had held this dual and inconsistent position ever since his election as trustee and did not appeal, though he filed an offer in compromise which was not accepted.

As the trustee was not making any effort to appeal, although urged to do so, the objecting creditor went to the chambers of Judge Kirkpatrick in Philadelphia within the thirty days allowed for appeal for the purpose of taking an appeal, but learned that the Judge was out of town and would not return for some time. On April 5, 1933, however, after the expiration of thirty days in which the appeal had to be taken, Judge Kirkpatrick did allow an appeal nunc pro tunc.

The trustee filed a motion in this court to dismiss the appeal. It was dismissed on the suggestion that the appellant would apply to the District Court for a reargument. Such application was made and a reargument was had. Thereupon Judge Kirkpatrick wrote an opinion, and later, after consultation with Judge Kirkpatrick, Judge Dickinson entered a decree thereon dismissing the exceptions and allowing the claim. From this order, an appeal was taken to this court.

As we understand it, the merits of the claim have never been passed upon by the court. This should be done if it is legally possible, for the learned District Judge in his opinion said: "The claim is a sizeable one, and a very able referee, after an exhaustive investigation, came to the conclusion that it was entirely without substance."

The real question for us to determine is whether or not a rehearing of a case may be allowed after the time, within which an appeal may be taken, has expired.

The appellee contends in support of his motion, that the District Court has no power to allow a petition for the rehearing of a claim for the simple purpose of extending the time allowed for an appeal of its order. Doubtless, that is a correct contention. Conboy v. First National Bank, 203 U. S. 141; Bonner v. Potterf, 47 Fed. (2d) 852 (C. C. A. 10). Such action would permit the defeat of the intention of section 25 (a) of the Bankruptcy Act, as amended, which provides that appeals in bankruptcy from an order allowing or rejecting a claim must be taken within thirty days after the order has been rendered. 11 U. S. C. A. section 48.

Unlike the law courts, a court of bankruptcy is always open and has no separate terms. In re Burr Manufacturing and Supply Company, 217 Fed. 16 (C. C. A. 2); In re Barker Piano Company, 233 Fed. 522 (C. C. A. 2). The Court retains control over the matters of a bankrupt before it, until the close of the case. Sandusky v. National Bank, 90 U. S. 289; In re Hamilton Automobile Company, 209 Fed. 596 (C. C. A. 7).

It is true that there is a limitation on the power of the bankruptcy court to reconsider claims which have been allowed. Section 57 (k) of the Bankruptcy Act provides that: (11 U. S. C. A. section 93, subdivision k).

> "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

The law was tersely stated by the Circuit Court of Appeals for the Seventh Circuit in the Matter of Stearns and White Company, 295 Fed. 833, 837:

> "We are of opinion that the judgments that may be appealed from under the provisions of section 25a are final judgments; that after the time for appeal has expired, unless a petition for reconsideration has been filed within 10 days, they may not be disturbed, except under the provisions of section 57k."

The appellant's rights are stated in section 57 (k). By it the District Court in its discretion could reconsider for cause the claim here involved. West v. W. A. McLaughlin and Company's Trustee, 162 Fed. 124 (C. C. A. 6); In re El Dorado Ice and Coal Company, 290 Fed. 180 (C. C. A. 8).

In this case before us, the District Court heretofore refused to accept the action of the referee in disallowing the claim on the ground that the objecting creditor was guilty of laches. We are in an anomalous position. The learned District Judge considered it just to give the objecting creditor an opportunity to have this court consider the claim, but at the same time, it was convinced that it had properly disposed of the matter by allowing the claim on the ground that the objecting creditor was barred by laches. The court therefore granted the petition for rehearing in order to allow the objecting creditor an appeal to this court, but at the same time affirmed its order allowing the claim, again refusing to consider the case on its merits because of the laches of the objecting creditor. In doing this, the court

stated that the reasons why its discretion should be exercised in granting the petition for rehearing were as follows:

> "My order allowing the claim was entered upon the sole ground of laches barring the defense offered, and therefore did not feel called upon to pass upon the fact questions raised by the defense. I think that in any case in which the Court feels that the situation precludes a consideration of any phase of what may be called the merits, a review is desirable.
>
> (b) The petitioner has some excuse for failing to appeal within the statutory period. He is not the trustee. The trustee originally presented, as attorney for the claimant, the claim which is not being resisted and represented the claimant over a long period of time. Whether he still continues to do so has not been made entirely clear to me, but at any rate it is easy to see that the Trustee's double position has been a source of embarrassment to the petitioner and other creditors throughout the whole proceeding.
>
> (c) The claim is a sizeable one, and a very able referee, after an exhaustive investigation, came to the conclusion that it was entirely without substance."

We are of the opinion that the claim should have been reconsidered under section 57k and a hearing had on the merits and facts surrounding the claim and the actions of those interested therein. If this was an ordinary case, we would be constrained to dismiss the appeal. But the referee carefully considered the claim on its merits and dismissed it as being entirely without substance. The trustee of the estate has acted in a dual position which was inconsistent and harmful. There has been conduct that is highly suggestive of bad faith and fraud. The trustee delayed action and refused to have the claim brought before this court. This position seems to have been injurious to the interests of the creditors as a whole whom he was elected to represent. His former client is now in this court prosecuting a motion to dismiss the appeal. The trustee's position has apparently been unfair to the creditors and his action improper. His former client now seeks to profit by the conduct of his

attorney which appears to have been wrong and, if it was, he should not be allowed to do so.

All that we have before us touching the merits of the claim is to the effect that it is wholly without substance. If this is so, it should not have been allowed.

The motion to dismiss the appeal is at this time denied.